

PRIVACY IN THE INTERNET AGE: TIME TO GO?

Glenn Harlan Reynolds

“ But here’s the real reason I think it’s going to be hard to protect privacy, I’m not sure how much people do care. ”

If I were in charge, how would I save privacy in the Internet Age? I’m not sure I would. Instead, I might opt for transparency.

Privacy may be overrated. At least, we should probably hope so. For most of human history, there wasn’t much privacy, you lived in a tribe or a small village, and everybody pretty much knew each other’s business. Even as late as the 19th century, apartment buildings were frowned upon because they made it hard for busybodies (then seen as virtuous defenders of community norms, not nosy annoyances) to monitor people’s comings, goings, and guests.

What we think of as privacy, in which most of our doings are our business and not easily discoverable by the general public, is a pretty recent development. Unfortunately, it may turn out to have been a short-lived artifact of a particular stage in technology. Before the Internet Age, gathering information on people was hard and organizing it

even harder, as other economic developments made escaping scrutiny from the village elders easier. Police and intelligence agencies could stay on top of things with regard to selected individuals, but the burden of keeping up with the populace at large was sufficiently high that there wasn't much danger of widespread surveillance.

Things are different now. The same technological revolution that has empowered individuals in other ways has also empowered states, businesses, and, yes, individuals to pry into other people's lives by making it easier and cheaper to collect and collate information. Cameras are ubiquitous in stores, on highways, in public squares and private buildings. Purchase, credit, and financial records are digital and easily indexed.

Of the changes, easy indexing is probably the biggest threat. Courts generally hold that things you do in public, with third parties, aren't private. When you dial a phone number, you're telling the phone company—a third party—the number, so it's not private. When you shop in a store, it's not private. When you drive down a highway, it's not private. But traditionally, people weren't able to put all those different bits of information together. Now, with computerization, that's child's play (sometimes literally so) and the product of all those isolated bits of information, each perhaps innocuous in itself, may be far more revealing than you imagine.

At present, there's no real protection against this sort of privacy threat (it's not legally defined as a privacy threat at all). Many people believe that there should be some sort of legal protection, but current statutes don't take the necessary overarching approach. Various bits of the problem get addressed. For example, a special statute protecting video rental records was passed when an alternative newsweekly published a list of the movies Robert Bork rented shortly after being nominated to the Supreme Court. But there's no big-picture treatment. In fact, there's not much agreement on what that kind of treatment

should look like, beyond a general sense that too much access to people's information is kind of creepy.

If I were going to change the law to protect privacy, I'd want to replace these scattered statutes with an overarching set of rules that apply consistently in all sorts of settings—to your video records, your medical records, your credit records, your Internet-surfing records, or store-camera footage of you shopping for birth control pills or hemorrhoid cream. Just thinking about how to come up with those rules is tiring, but in theory, at least, we could develop guidelines for returning a modicum of privacy to individuals, so long as others follow the rules. How likely is that, though?

David Brin, in his book, *The Transparent Society*, argues that privacy is a lost cause, given the tremendous technological boost to privacy invasions. He recommends that we substitute transparency—making sure that people can see what the authorities are doing and who is looking into their records—as a check on misbehavior. I think that this is a terrific idea, and have made similar arguments myself, but I wonder how well it will work. My own county government has been roiled by scandal because its members ignored the state's open-meetings law, something that's hardly rocket science. They did so, presumably, because they didn't want the citizens to know what they were doing. Regardless of the law, this is likely to be the position of authorities in general: "Privacy for us big shots, transparency for the rest of you."

I don't think that's an insuperable problem, if people care. But here's the real reason I think it's going to be hard to protect privacy, I'm not sure how much people do care. In our celebrity culture, individuals work hard to get television airtime to talk about their personal lives in ways that Americans a generation ago would have found startling, and that Americans a few more generations ago would have considered grounds for a duel, or a horsewhipping on the outskirts of town. Teens (and fat old people) post nude pictures on Flickr, a

photo-sharing website, by the millions. And shoppers happily hand over their personal information at the grocery store in exchange for a modest discount on peas and frozen yogurt. People's desire for privacy feeds on shame, and while people a few decades ago were ashamed of things like going to the bathroom or having a period, such things seem absurd as grounds for shame now. And with sharply reduced shame comes sharply reduced concerns about privacy.

My first item on privacy protection, then, before any laws or regulations are passed, would be an effort to get the public to care more about privacy, and to understand how information about them, even seemingly unimportant information, might be abused. What people care about in this regard matters, because, ultimately, the public will get as much privacy as it demands. And not one bit more.

About the Author

Glenn Harlan Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee, and the publisher of InstaPundit.com.